PUA KIAM WEE v. UTUSAN MELAYU (MALAYSIA) BHD

HIGH COURT MALAYA, KUALA LUMPUR
HUE SIEW KHENG J
[SUIT NO: 23NCVC-3-01-2015]
29 DECEMBER 2015

TORT: *Defamation – Defamatory statements – Apology – Whether prompt attempt at apology made – Whether adequate – Whether a compelling mitigating factor – Whether there was a dereliction of duty to verify facts – Defamation Act 1957, s. 10*

TORT: *Damages – Quantum – Defamation – Whether there was a dereliction of duty to verify facts – Nature of libel – Mode and extent of publication – Whether general damages of RM200,000 fair and reasonable*

The defendant's appeal herein was only in respect of the quantum of RM200,000 and costs of RM15,000 awarded against it in a defamation suit brought by the plaintiff. The plaintiff, in suing the defendant for defamation based on defamatory statements made by the defendant, alleged that the defendant did not make any attempt to verify the facts with the plaintiff or to afford the plaintiff any opportunity to comment on the articles before publication. In one Tan's apology dated 13 February 2015, it contained an admission that the statements he had made about the plaintiff were without basis. The defendant's apology, however, was only published on 23 May 2015. The issues that arose were (i) whether the defendant had made a prompt attempt at apology; and (ii) whether the defendant had been in dereliction of its duty to verify the facts as implied in its apology withdrawing the article.

Held (awarding damages of RM200,000 to plaintiff):

(1) There was no promptness in the apology published by the defendant: it was made some six months after the publication of the article complained of, and after a trial date had been fixed which was vacated because the parties were agreeable to settle on quantum. This was not an adequate apology as propounded by *Gatley on Libel and Slander*, nor an apology that fell within the context and meaning of s. 10 of the Defamation Act 1957. It was a perfunctory apology. Its mitigating effect was diminished by the delay, for which no explanation had been proffered. (paras 9 & 12)

(2) The defendant was in dereliction of its duty to verify the facts as implied in its apology withdrawing the article. The defendant should not be treated with kid's glove and given a mere slap on the wrist for its actions. This was a case where damages should not be driven down to a level where publishers might with equanimity be tempted to risk having to

pay. Taking into consideration the plaintiff's position and standing, the nature of the libel, the mode and extent of the defendant's publication, the perfunctory apology tendered and the cavalier conduct of the defendant in its publication of the article, general damages of RM200,000 was fair and reasonable. (paras 29-31)

Case(s) referred to:
Chin Choon v. Chua Jui Meng [2005] 2 CLJ 569 CA ***(refd)***
Dato' Dr Tan Chee Khuan v. Chin Choong Seng [2011] 8 CLJ 574 HC ***(refd)***

Legislation referred to:
Defamation Act 1957, s. 10(1), (2)

Other source(s) referred to:
Gatley on Libel and Slander, 11th edn, pp 268, 983

For the plaintiff - NS Guok; M/s Guok Partnership
For the defendant - Sara Ann Chong (Arief Zachary with her); M/s Arman-Yunos

Reported by Suhainah Wahiduddin

JUDGMENT

Hue Siew Kheng J:

[1] The defendant's appeal herein is only in respect of the quantum of RM200,000 and costs of RM15,000 awarded against it in a defamation suit brought by the plaintiff.

Background Facts

[2] The plaintiff, commonly known as Tony Pua, is a Member of Parliament for Petaling Jaya Utara. The defendant is the publisher of the Utusan Malaysia, a national newspaper. On or about 14 November 2014, one Tan Tuan Tat had made a statement which was subsequently published on 15 November 2014 by the defendant in the Utusan Malaysia in an article entitled "Tony, Anwar Dirujuk Jawatankuasa Hak dan Kebebasan" (the article). The article was also published in Utusan Online.

[3] The article contained, among others, the following words which the plaintiff contends are defamatory of him:

> Janganlah setakat jadi 'pelacur politik' sedangkan aktiviti perniagaan sendiri pun lingkup (the First Defamatory Statement).
>
> Tuan Tat mendakwa Tony Pua sebelum ini pernah menjalankan perniagaan kedai makan di Singapura dan sebuah lagi di negara ini iaitu Rocket Cafe, tetapi kedua-dua perniagaan itu tidak berjaya malah dipercayai tidak mempunyai lesen perniagaan (the Second Defamatory Statement).
>
> Oleh itu, Tony Pua tidak perlu tunjuk pandai dalam urusan perniagaan. Masyarakat juga mahu belajar macam mana kamu uruskan perniagaan itu

(the Third Defamatory Statement).

Saya berharap Tony Pua akan menimbangkan perkara ini sebelum memalukan diri sendiri (the Fourth Defamatory Statement).

(collectively, the Defamatory Statements)

[4] Taking offence at the above defamatory statements the plaintiff instructed his solicitors to issue a letter of demand dated 6 January 2015 that the defendant issues an apology, gives an undertaking not to further publish the article and pay damages to the plaintiff.

Defendant's Submission

[5] It is not disputed that on 23 May 2015 an apology was published by the defendant in the Utusan Malaysia and its website.

[6] The defendant urged this court to award the plaintiff damages of RM40,000 only with costs of RM10,000 primarily on the ground that an apology was tendered.

[7] Learned counsel for the defendant had submitted, *inter alia*, as follows:

9. Whilst the Defendant's solicitors are in the process of liaising with the Plaintiff's solicitors on the preparation of the Common Bundle of Documents, the Defendant noticed that the one Tan Tuan Tat (the person who is reported by the Defendant making statements about the Plaintiff) has admitted that the statements about the Plaintiff were made without proper basis. Soon after that, the Defendant notify the Plaintiff that the Defendant shall publish its apology statement on 23.5.2015. The Defendant even offer costs of RM10,000.00 and damages of RM15,000.00 to the Defendant. We humbly submit that the Defendant's prompt act shows that the Defendant is acting in a *bona fide* manner and in sincerity in order to settle this matter amicably.

The Apology

[8] This suit was filed in January 2015. During the third case management on 5 May 2015, trial dates were fixed for 8-9 July 2015. By letter dated 19 May 2015, the defendant's solicitors wrote to the plaintiff's solicitors informing that the defendant would be publishing a full apology to the plaintiff in the Utusan Malaysia at p. 10 (the article was originally published in p. 10 of the same newspaper) and also in its website.

[9] Given that the apology was only published on 23 May 2015, more than six months after the publication of the article and almost four months after this suit was filed, wherein trial dates had been already fixed, I am of the view that this apology does not fully satisfy the requirement of s. 10 of the Defamation Act 1957.

[10] Section 10 provides:

> Apology in mitigation of damages
>
> 10. (1) In any action for defamation the defendant may **(after notice in writing of his intention to do so duly given to the plaintiff at the time of filing his written statement of his case)** give in evidence, in mitigation of damages, that he made or offered an apology to the plaintiff for such defamation **before the commencement of such action or as soon afterwards as he had an opportunity of doing so** in case the action shall have been commenced before there was an opportunity of making or offering such apology.
>
> (2) In an action for libel contained in any newspaper any defendant who has paid money into court under the provisions of any written law relating to civil procedure may state in mitigation of damages, in his written statement of his case, that such libel was inserted in such newspaper without actual malice and without gross negligence and that, **before the commencement of the action or at the earliest opportunity afterwards,** he inserted or offered to insert in such newspaper a full apology for the said libel, or, if the newspaper in which the said libel appeared should be ordinarily published at intervals exceeding one week, had offered to publish the said apology in any newspaper to be selected by the plaintiff in such action.

(emphasis added)

[11] From the language employed in the two subsections it is clear that for an apology to operate as a compelling mitigating factor, it must be made timeously.

[12] It must be shown that the apology was made or offered to be made before the commencement of such action or as soon afterwards as he had opportunity of doing so. This is provided in sub-s. 1.

[13] Subsection 2 does not apply here because the defendant did not deposit any money into court, in mitigation of damages.

[14] By para. 9 of the defendant's written submission (see para. 7 of this judgment) learned counsel for the defendant had made reference to the apology of Tan Tuan Tat and mentioned it had "noticed" the apology, without disclosing when the apology was first noticed. This is nothing more than a statement from the Bar.

[15] Be that as it may, Tan's apology was dated 13 February 2015. It contained an admission that the statements he had made about the plaintiff were without basis.

[16] The defendant's apology was only published on 23 May 2015. By no stretch of the imagination can this be said to be a prompt attempt at apology.

[17] The defendant referred to the following passages in *Gatley on Libel and Slander*, 11th edn 2008 (at p. 1041 para. 31.1 and p. 1234-1235 para. 35.55

respectively):

> Apology: mitigation and defence. A defendant may rely in mitigation of damages on the fact that he has made an adequate apology to the plaintiff for the publication of the matter complained of.
>
> 35.55 Effect of apology. Although apology is no defence to an action for libel or slander, the prompt publication of an apology can be substantial mitigation of damages. The right of the defendant to give evidence that he made or offered an apology is statutorily enacted, but in practice this statute is rarely invoked as it has long been recognised that evidence of an apology is admissible in mitigation of damages. **The sooner an apology is published the greater its mitigating effect,** but an apology offered or published after the commencement of the action, or even in the course of trial, may be put forward as mitigation. (emphasis added)

[18] It is the defendant's contention that the apology published is an adequate apology.

[19] Given the provisions of s. 10 of the Defamation Act (which the defendant is relying on) which is the statutory provision governing apology as a mitigation factor, it is my view that the primary consideration is that it must be made promptly, as soon as the situation or circumstances of the case warrants it. A delayed apology would require an explanation.

[20] I find that there was no promptness in the apology published by the defendant: it was made some six months after the publication of the article complained of, and after a trial date had been fixed which was vacated because the parties were agreeable to settle on quantum. It was made three months after Tan's apology which according to the submission of learned counsel for the defendant was what prompted the apology to be made. This to my mind is not an adequate apology as propounded by *Gatley* nor an apology that falls within the context and meaning of s. 10. It was a perfunctory apology. Its mitigating effect is diminished by the delay, for which no explanation has been proffered.

The Law

[21] It is trite that in cases of defamation, damages are awarded not for pecuniary loss, but as compensation for:

(i) injury to reputation; and

(ii) injury to feelings – the indignity, mental suffering, disgrace, humiliation, discomfort, inconvenience of being defamed.

[22] In defamation, it is presumed that some damage will flow and the plaintiff need not prove actual damage. *Gatley on Libel and Slander* (11th edn) states (at p. 983):

> In cases of libel ... the Plaintiff need not prove actual damage, for the law presumes that some damage will flow in the ordinary course of things

A from the mere invasion of his absolute right to reputation:

[23] The Court of Appeal in the case of *Chin Choon v. Chua Jui Meng* [2005] 2 CLJ 569; [2005] 3 MLJ 494 held that the following are factors to be taken into account in determining the quantum of damages:

B (i) the gravity of the allegation;

(ii) the size and influence of the circulation;

(iii) the effect of the publication;

(iv) the extent and nature of the claimant's reputation;

C (v) the behaviour of the defendant; and

(vi) the behaviour of the claimant.

[24] Similar views were expressed in the case of *Dato' Dr. Tan Chee Khuan v. Chin Choong Seng* [2011] 8 CLJ 574.

D **[25]** *Gatley on Libel and Slander* cautioned (at p. 268):

> While the level of damages should not be so high as unduly to curtail freedom of expression, "the court should be careful not to drive down damages in libel cases to a level which publishers might with equanimity be tempted to risk having to pay." (see *Nail v. News Group Newspapers Ltd* [2004] EWCA Civ. 1708)

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[26] This is particularly pertinent to the present case as it is public knowledge that the defendant is no stranger to defamation suits. The law journals often carry reports where the defendant is featured as a party.

F **[27]** In fact, the plaintiff had pleaded in his statement of claim the following:

> 16. In support of the Plaintiff's claim for general damages and/or aggravation of damages and/or punitive, the plaintiff will rely on the fact that, despite the gravity of the allegations or the said
G Defamatory Statements being made by the Defendant, the Defendant did not make any attempts to verify the facts with the Plaintiff and/or from any reliable and/or independent source of news or to afford the Plaintiff any opportunity to comment on the said First, Second, Third and Fourth Defamatory Statements and/ or the said Articles before publication ...
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> H 17. In addition, the Defendant had on 2 occasion issued defamatory statements against the Plaintiff. Particulars of the suits are as follows:
>
> 17.1 The Defendant was sued by the Plaintiff *via* Kuala Lumpur High Court Writ No: 23NCVC-98-12/2013 (*Tony Pua Kiam*
> I *Wee v. Dato' Seri Dr. Ahmad Zahid Hamidi*, Utusan Melayu (M) Berhad & Datuk Abdul Aziz Ishak) over an article entitled "Tony Pernah Ditahan Di Singapura" published in Utusan Malaysia newspaper on 18.3.2011. The Defendant subsequently retracted the said article after mediation process

organised by Kuala Lumpur High Court Mediation Centre.

17.2 The Defendant was again sued by the Plaintiff *via* Kuala Lumpur High Court Writ No: 23NCVC-9-02/2014 (T*ony Pua Kiam Wee v. Utusan Melayu (M) Berhad*) over an article entitled "Kaduk Naik Junjung" published in Utusan Malaysia newspaper on 30.6.2013. The Defendant again retracted the said article after mediation process organised by the Kuala Lumpur High Court Mediation Centre.

[28] The defendant has responded by stating that these cases were settled out of court and no finding of culpability was made.

[29] This to my mind is not an adequate answer to the serious allegation that the defendant is in dereliction of its duty to verify the facts as implied in its apology withdrawing the article.

[30] The defendant should not be treated with kid's glove and given a mere slap on the wrist for its actions. This is a case where damages should not be driven down to a level where publishers might with equanimity be tempted to risk having to pay as highlighted by the learned authors of *Galley on Libel and Slander.*

[31] Taking into consideration the plaintiff's position and standing, the nature of the libel, the mode and extent of the defendant's publication, the perfunctory apology tendered and the cavalier conduct of the defendant in its publication of the article, I am of the view that general damages of RM200,000 is fair and reasonable.